

## ISSUES

The Administrative Law Judge denied claimant's request for workers compensation benefits finding claimant failed to prove he suffered a work-related accidental injury and failed to prove he provided respondent with timely notice of accident. Claimant appealed and contends the record proves he aggravated a preexisting low-back condition while performing his regular work activities while employed by the respondent. Furthermore, claimant contends the record establishes he had just cause for not giving respondent notice of accident within 10 days as required by K.S.A. 44-520.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

#### **Did claimant suffer a work-related accidental injury?**

Claimant started working for the respondent in 1988. The record establishes that claimant had previous problems with his low back and was treated by a chiropractor as early as 1986. Claimant was also treated for continued low-back problems while he was employed by the respondent in 1992 and 1993.

Claimant alleges he permanently aggravated this preexisting low-back condition while performing his regular work duties for the respondent on June 11, 1994, and for four work days after June 11, 1994, until he terminated his employment with the respondent on June 30, 1994. Claimant testified he was working as a third shift sanitation worker on the date of accident. Claimant was assigned to clean the east bakery area of the respondent's plant. His work duties, among other duties, required him to lift heavy chemicals and ladders; use high pressure hoses; climb upon and under plant machinery in order to clean the area for the next shift production.

Claimant testified his low back became symptomatic as he was performing those regular work activities of lifting, bending, and stooping. He testified he notified his lead supervisor, Rick Ardis, that his back was hurting and he left work before he completed his work shift on June 11, 1994.

The next morning claimant could hardly get out of bed and could hardly walk because of extreme pain in his back. Claimant testified that he did not return to work until after he went on his own to see Michael Lum, D.O., for treatment on June 16, 1994. However, the parties stipulated that the records of the respondent indicate claimant did return to work on June 14, 1994.

Claimant had previously treated with Dr. Lum for low-back problems while he was employed by respondent. Claimant was first seen by Dr. Lum's physician assistant on September 12, 1992, with low-back complaints. After the physician assistant examined the claimant, he referred claimant for consultation with orthopedic surgeon Milo G. Sloo, III, M.D., in Salina, Kansas.

Dr. Sloo saw claimant on December 2, 1992. Dr. Sloo completed a physical examination of claimant and diagnosed degenerative disc disease of the lumbosacral spine with stenosis syndrome. Dr. Sloo released claimant with no further treatment recommendations except claimant was given a back care booklet to read concerning his low-back problems.

However, in 1992 and 1993, claimant returned to see Dr. Lum or his physician assistant for continuing low-back complaints. After the June 11, 1994, alleged injury, Dr. Lum saw claimant on June 16, 1994. Dr. Lum took claimant off work from June 14, 1994, through June 20, 1994. He diagnosed claimant with degenerative disc disease and chronic low back pain.

Claimant returned to work on June 21, 1994, and was immediately suspended for three days for failure to call in and notify the respondent that he was unable to come to work. Claimant returned to work on June 25, 1994, and was physically unable to work because of continuing low-back pain.

Claimant returned to the Minor Emergency Center and in Dr. Lum's absence obtained a medical opinion from Dr. Lum's associate, Michael D. Grant, M.D., who advised claimant to change his line of work because of his degenerative disc disease. On June 30, 1994, claimant presented this medical note to the respondent and resigned from his employment.

Claimant continued his treatment with Dr. Lum for his low-back pain after he terminated his employment with the respondent. A CT scan examination was completed on November 11, 1994, that showed disc bulges at L3-L4 and L4-L5. Because claimant was not making any improvement with conservative treatment, Dr. Lum referred claimant again to Dr. Sloo.

Dr. Sloo saw claimant on March 22, 1995. At that time, Dr. Sloo found claimant with marked degenerative disc disease, a herniated disc, and stenosis syndrome. Dr. Sloo continued conservative treatment, but claimant's condition did not improve. Dr. Sloo then recommended surgical intervention. On June 23, 1995, Dr. Sloo performed a bilateral lumbosacral laminectomy and discectomy.

Both Dr. Lum and Dr. Sloo testified in this matter. Neither of the doctors' extensive medical treatment records specifically related claimant's current low-back symptoms to his work activities. However, after reviewing claimant's work duties, both doctors opined, within a degree of medical probability, that those work duties aggravated claimant's preexisting low-back condition and were causally related to claimant's current symptomatic condition.

The Administrative Law Judge found claimant failed to sustain his burden of proving he suffered a work-related accidental injury. The Administrative Law Judge concluded there was no way of knowing when claimant's large herniated disc at L5-S1 occurred or

further whether claimant's degenerative disc disease deterioration was a natural progression of the disease process or the result of normal activities of life.

The Appeals Board disagrees with the Administrative Law Judge and concludes that claimant's testimony, coupled with the medical testimony of his two treating physicians established that his work activities on June 11, 1994, permanently aggravated his preexisting low-back condition. This aggravation was to such an extent that claimant could hardly get out of bed and could hardly walk the next day. Although claimant did not return to work after he terminated his employment with the respondent on June 30, 1994, those increased symptoms remained and did not respond to conservative treatment. Thereafter, surgical intervention was required and performed by orthopedic surgeon Dr. Sloo. An employee's preexisting condition is compensable when the condition is aggravated, accelerated, or intensified by the employer's work activities. See Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, Syl. ¶ 1, 573 P.2d 1036 (1978).

#### **Did claimant give respondent timely notice of accident?**

Claimant was required to give respondent notice of his work-related accident within 10 days or show just cause within 75 days for failure to give the 10-day notice. See K.S.A. 44-520.

Claimant testified, at the regular hearing, that he did not know his work activities had caused his low-back symptoms until he completed some research through medical books. After he made this conclusion, he then sought the assistance of an attorney who served respondent with a claim for workers compensation. The parties stipulated that claimant served respondent with a claim for workers compensation benefits on August 25, 1994. This is within 75 days of claimant's accident date of June 11, 1994. Claimant argues the notice requirement of K.S.A. 44-520 was extended to 75 days as just cause was established when claimant had to complete some research before he could ascertain whether he had sustained a work-related injury. Accordingly, claimant argues he satisfied the statutory notice requirement by serving a written claim for compensation on respondent on August 25, 1994.

The problem the Administrative Law Judge had with claimant's argument and the problem the Appeals Board also has with claimant's argument, is that claimant testified at a previous preliminary hearing that he knew his work activities had caused his preexisting low-back condition to become symptomatic on June 11, 1994. At that time, claimant also testified he notified his lead supervisor, Rick Ardis, on June 11, 1994, he hurt his back at work. Rick Ardis, however, testified that claimant did not relate his back pain to his work. Claimant testified, at both the regular hearing and at the preliminary hearing, that the next morning following June 11, 1994, he was in so much pain he could hardly get out of bed and could hardly walk. As previously noted, the record also established claimant saw Dr. Lum for his low-back symptoms on June 16, 1994. At the preliminary hearing, claimant testified Dr. Lum told him his work activities were causing his low-back problems and he should discontinue that line of work.

Furthermore, claimant testified he had reported work-related accidents to the respondent before this incident. Also, claimant admitted he knew respondent had a policy requiring employees to immediately report work-related accidents. Claimant had in the past worked in a temporary lead position and had filled out the required accident reports.

The Appeals Board finds that claimant's testimony in regard to notice of accident is inconsistent. On the one hand, claimant claims he notified the respondent immediately he was injured at work on June 11, 1994. On the other hand, claimant argues he did not notify respondent within 10 days but had just cause for not giving the 10 day notice. As such, the Appeals Board concludes the Administrative Law Judge's finding that claimant failed to prove he gave respondent timely notice of accident as required by K.S.A. 44-520 should be affirmed.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bruce E. Moore dated May 27, 1997, should be, and is hereby, affirmed and claimant is denied benefits under the workers compensation act for failure to give respondent timely notice of accident.

The assessment of fees against the respondent necessary to defray the expenses of the administration of the workers compensation act for the costs of the transcripts as set forth in the Administrative Law Judge's Award are herein adopted by the Appeals Board.

### **IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger A. Riedmiller, Wichita, KS  
Donald G. Reinsch, Salina, KS  
Norman R. Kelly, Salina, KS  
Bruce E. Moore, Administrative Law Judge  
Philip S. Harness, Director